No. 11063

IN THE

# United States Circuit Court of Appeals

## FOR THE NINTH CIRCUIT

RICHARD ROLAND HAUGEN,
*Appellant,*

vs.

UNITED STATES OF AMERICA,
*Appellee.*

*Upon Appeal from the District Court for the Eastern District of Washington, Northern Division*

# Brief for the Appellant

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*Attorneys for Appellant.*

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## STATEMENT OF PLEADINGS AND FACTS DISCLOSING BASIS FOR JURISDICTION

Appellant Richard Roland Haugen appeals from judgment and commitment upon conviction under an indictment charging him with making, forging, counterfeitig, uttering, publishing and possession of obigations of the United States and other writings in violation of Sections 72 and 73, Title 18, U. S. C. A., committed within the Eastern District of Washington, Southern Division.

## STATEMENT OF THE CASE

The appellant Richard Roland Haugen was charged by an indictment with a violation of Sections 72 and 73, Title 18, U. S. C. A., ~~with~~ making, forging, counterfeiting, uttering, publishing, and possession of obligations of the United States and other writings. The indictment contained three counts, and charged in substance that appellant on the 19th day of April, 1944, at Hanford, in the County of Benton, in the Southern Division of the Eastern District of Washington, knowing the same to be false, fraudulent and counterfeit had in his possession, with intent that they be uttered and put off as true, approximately 966 counterfeit meal tickets purporting to have been issued by the Olympic Commissary Company, a corporation, which was at the time an agency of the United States and the Army Engineers Corps engaged in the construction of a defense

project at Hanford; that the Olympic Commissary was to furnish and dispense meals to workmen; that the food and supplies from which the meals were prepared were the property of the United States; that the proceeds of the tickets validly issued by the Commissary Company became the property of the United States, and the counterfeit tickets possessed by defendant were not printed, sold or authorized by the United States, the Commissary Company, or any lawful representative of either, but were ordered and purchased by appellant from a private printer and were intended to be used by appellant and others for the purchase of food and meals from the Olympic Commissary Company without lawful payment and with intent to defraud the United States.

Count two charges the sale of six of the counterfeit tickets to one J. L. Holloway, and count three charges the sale of one of such tickets to R. P. McDonald. Each of said counts contained the allegation that such act was with intent to defraud the United States (R. 2-7).

In 1942 the Government condemned severa hundred thousand acres of land in Benton County, Washington, and the E. I. du Pont de Nemours Company began the construction of a vast defense project. Thousands of men were engaged over a period of two years building this project and millions of dollars were spent. It was a matter of national speculation as to the reason for this

vast undertaking. The secret was well kept for it was not until V-J Day that the American people learned that the Hanford Engineering Works was engaged in the manufacture of the atomic bomb.

The indictment referred to under which defendant was tried was filed August 11, 1944. The defendant had been previously indicted in the spring of 1944 in Cause No. C-3929 and his case came regularly on for trial at 10 o'clock a. m., on June 14, 1944, in Yakima. The defendant had pleaded "not guilty" to this original indictment, and on said date both sides announced themselves ready for trial to the Court without a jury (R. 46). Mr. Etter, an assistant United States Attorney, then made a comprehensive opening statement for the Government. Mr. Sandvig, defendant's trial attorney, moved for an order of dismissal upon the opening statement of counsel for the Government (R. 54).

After discussion and argument, the Court sustained the demurrer to the indictment but ruled that defendant had not been in jeopardy and could be re-indicted, and he was admitted to bail in the sum of $500.00 (R. 67).

Defendant's counsel specifically reserved the right to raise the question of former jeopardy, to which the Court consented (R. 68).

Subsequently and on October 5, 1944, the defendant was again brought to trial upon the indictment of Au-

gust 11, 1944, which indictment had been returned by the Grand Jury after the Court had sustained the demurrer to the original indictment. The trial was again to the Court without a jury upon stipulation of the parties (R. 68).

The Government introduced the testimony of several witnesses in an attempt to sustain the allegations of the indictment. This evidence tended to establish that defendant, who had been an employee at Hanford, had employed George F. Allen, a printer, at Tacoma, Washington, to print a thousand meal tickets which were reasonable facsimilies of those issued by the Olympic Commissary Company. The evidence also tended to establish that defendant had put off the six tickets mentioned in Count Two to witness Holloway and the one ticket mentioned in Count Three to the witness McDonald. By the witness John Cron, the Chief Cashier of the Olympic Commissary, and Major R. F. Ebbs, the Executive Officer of the Hanford Engineering Works, it was sought to establish that the Olympic Commissary Company was an agency of the United States and that defendant possessed and uttered the counterfeit tickets with intent to defraud the United States. Timely objections were made to the introduction of each item of evidence which tended to support these conclusions (R. 103).

The case being tried to the Court without a jury, Major Ebbs was permitted to testify that the du Pont

Company was performing the construction work at Hanford as prime contractor, and the Olympic Commissary Company had a subcontract with du Pont to purvey food. His testimony established that the prime contract with du Pont was secret by order of the War Department (R. 103). The Olympic Commissary subcontract with du Pont was likewise secret (R. 106).

The original contracts which were in the office of the Comptroller General in Washington, D. C., were not offered in evidence, nor were certified copies produced. Having refused to submit the contracts, as the best evidence to the Court or the defendant, the witness was then permitted to testify orally as to their contents which were deemed pertinent under the indictment. The trial Court concedes that "plaintiff's case on the question of the relationship between Olympic Commissary and the Government and in support of its position that these counterfeit meal tickets were intended to defraud the Government was based exclusively upon this testimony as to the content of the contracts" (R. 12).

At the conclusion of the Government's evidence, the defendant rested without the introduction of testimony. The Trial Court took the matter under advisement and on December 22, 1944, filed an opinion, the concluding portion of which states: "Since the plaintiff has failed to present the best evidence available to it, I am forced to conclude that I should have sustained the objection

to the introduction of such testimony. That being true, it is my duty now to disregard it. Without such evidence, plaintiff has failed to sustain its burden that the Olympic Commissary was an agency of the United States and that the counterfeiting of its meal tickets was calculated to defraud the United States. Therefore, the action must be dismissed" (R. 18).

After the filing of the Court's opinion determining the case, counsel for the plaintiff on December 27, 1944, filed a "*Motion to re-open trial in compliance with Court's Memorandum Decision,*" and an Order permitting such re-opening was filed on February 13, 1945 (R. 19-24). The matter then came on for the taking of additional testimony on April 11, 1945. Objection was timely made to the introduction of any further evidence in the case upon the ground that defendant had already been dismissed by the determination of the Court and had been in jeopardy. The objection was overruled and the Government called as its witness Lt. Col. Ralph G. Cornell, the Legal Advisor to the Chief Engineer at Washington, D. C., who was permitted to testify that he had seen the original contract between the Government and the du Pont Company, and the original subcontract between the du Pont Company and the Olympic Commissary Company and to give his conclusions as to the contents and legal effect of the contracts. Based upon this testimony the Trial Court ren-

dered an oral decision reversing his former written memorandum and finding the defendant guilty (R. 176-182).

Judgment and commitment was filed May 7, 1945, under which the defendant was sentenced to imprisonment for one year and one day on each of the three counts of the indictment, the sentences to run concurrently (R. 26).

Defendant filed his notice of appeal May 11, 1945, setting forth his grounds of appeal (R. 27-29).

Pending the determination of the appeal, defendant is at liberty upon bail bond.

## ASSIGNMENTS OF ERROR

### ASSIGNMENT OF ERROR NO. 1

The District Court erred in overruling defendant's plea of former jeopardy by reason of defendant's having been put upon trial for the same offense in case No. C-3929, entitled "United States of America, Plaintiff, vs. Richard Roland Haugen, Defendant," in the above-entitled Court, in which case the Court sustained an oral demurrer to the indictment after the opening statement in behalf of the plaintiff (R. 39).

### ASSIGNMENT OF ERROR NO. 2

The District Court erred in admitting over the objec-

tion of defendant hearsay evidence as to the contents of the contract between the United States of America and E. I. duPont deNemours & Company and the subcontract between the duPont Company and Olympic Commissary Company, the contract being the best evidence, as follows:

"Q. First I wish to ask you some general questions. Who is the company that is doing the construction work at Hanford?

Mr. Sandvig: If he knows of his own personal knowledge.

Mr. Erickson: He is in charge of the construction.

A. Am I to answer if I know it of my own personal knowledge or officially?

Mr. Sandvig: Of your own personal knowledge.

Q. If you know it officially.

Mr. Sandvig: No; of his own personal knowledge.

A. The E. I. duPont deNemours Company.

Q. The E. I. duPont deNemours Company is building the project at Hanford?

A. They are the prime contractor.

Q. By prime contractor you mean they have the contract with the United States government?

Mr. Sandvig: I object as not the best evidence. If there is a contract between the duPont com-

pany and the United States, the contract itself is the best evidence.

The Court: I am inclined to agree with you, but I will let him answer and allow an exception, and I may later strike out the answer. I don't know yet.

(Question read by reporter.)

A. Yes.

Q. Now the contract which the E. I. duPont deNemours Company has with the United States. is that a public contract, or otherwise?

Mr. Sandvig: May it be understood, Your Honor, without bothering the Court all the time, that I am objecting to all of this?

The Court: It is all subject to your objection, and an exception is allowed.

A. The contract is a secret contract.

Q. By whose orders is it a secret contract?

A. By the War Department.

Q. And you have——

The Court: Wouldn't that be a thing which——

Mr. Sandvig: I am taking it for granted my objection goes to all of this.

The Court: The Secretary of War would issue some sort of an order, would he not?

Mr. Sandvig: Yes, sure.

The Court: That it would be secret?

Mr. Erickson: I will establish that, I think.

The Court: All right.

Mr. Sandvig: The order itself would be the best evidence. That is like me saying what the statute is.

The Court: Go ahead, Mr. Erickson.

Q. Did the War Department, or who in the War Department issued that order?

Mr. Sandvig: If you know of your own personal knowledge.

A. The order came to my commanding officer from the office of the Chief of Engineers.

Mr. Sandvig: I make the same objection.

The Court: It is all being admitted subject to your objection.

Mr. Sandvig: I am afraid I will slip up on something.

The Court: You are not going to slip up on anything. You have your objection. It does seem to me, Mr. Erickson, that the order making it secret is something that could be produced.

Q. ((Mr. Erickson): Is that something that can be produced?

A. I am not sure it was not a verbal order.

Q. Whom did you receive instructions from that the contract was secret?

A. I received verbal instructions from the office of the Chief of Engineers.

Q. And who in that office?

Mr. Sandvig: Subject to my objection.

Q. From whom in that office did you receive the instructions?

A. I received instructions that individual's name was not to be brought into a public hearing.

The Court: What justification could there be for concealing from the public an order which says that the contract is to be secret? He says he has orders to keep secret who gave the order." (R. 102-105)

ASSIGNMENT OF ERROR NO. 3

The District Court erred in permitting the plaintiff to introduce over objection oral secondary evidence as to the legal effect and contents of said contract, particularly between the duPont Company and Olympic Commissary Company, said subcontract being the best evidence, as follows:

"A. The E. I. duPont deNemours Company have a cost-plus fixed-fee contract with the government.

Q. Explain so we can understand——

Mr. Sandvig: The contract is the best evidence.

The Court: Yes; this all goes in over your objection." (R. 108)

ASSIGNMENT OF ERROR NO. 4

The District Court erred in overruling defendant's objection to the introduction of further testimony after the written opinion of the Court filed December 22,

1944, stating, "The action must be dismissed," as follows:

"Q. Will you state your name, please?

Mr. Sandvig: At this time, if the Court please, I want to object to the introduction of any evidence in this case—any further evidence in the case—on the ground and for the reason that the defendant has already been dismissed from the charge predicated against him, and that he has been in former jeopardy.

I just want to make this observation at this time. Your Honor wrote an opinion of the Court. It was signed by Your Honor. You went into the facts. You make your conclusions at considerable length. I do not know of any particular form of findings of fact and conclusions of law or decree or judgment that are required, but you go into it at great length.

The Court: I say at the end that the action must be dismissed.

Mr. Sandvig: Yes. And I say it is dismissed.

The Court: I will overrule the objection. There was no order of dismissal entered, as I construe it." (R. 139-140)

## ASSIGNMENT OF ERROR NO. 5

The District Court erred in entering the order permitting reopening, filed February 13, 1945 (R. 23-24).

## ASSIGNMENT OF ERROR NO. 6

The District Court erred in admitting in evidence additional hearsay testimony relating to the contract

between the United States of America and the duPont Company after such reopening, as follows:

> "Q. Now directing your attention to the original contract between the United States Government and the E. I. duPont deNemours Company, what provision is made in that contract about property used in the prosecution of the work on the Hanford Engineer Works?
>
> Mr. Sandvig: I object to that as not being the best evidence. The witness has the contract before him. They have opened the doors now, and the contract is no doubt admissible. He has been using it for evidence, and certainly the contract is the best evidence. No matter how good a lawyer he may be, we might disagree on its interpretation. The contract itself is the best evidence.
>
> The Court: "The objection is overruled." (R. 148-149)

## ASSIGNMENT OF ERROR NO. 7

There was a total failure of proof and no substantial evidence to prove the intent of the defendant to defraud the United States of America or any agency thereof.

## ASSIGNMENT OF ERROR NO. 8

The verdict of the Court and judgment of conviction is contrary to the law and the evidence.

## ARGUMENT FOR APPELLANT

*Specification of Error No.* 4. The District Court erred in overruling defendant's objection to the introduction of further testimony after the written opinion of the Court filed December 22, 1944, stating, "The action must be dismissed," as follows:

> "Q. Will you state your name, please?

Mr. Sandvig: At this time, if the Court please, I want to object to the introduction of any evidence in this case—any further evidence in the case—on the ground and for the reason that the defendant has already been dismissed from the charge predicated against him, and that he has been in former jeopardy.

I just want to make this observation at this time. Your Honor wrote an opinion of the Court. It was signed by Your Honor. You went into the facts. You make your conclusions at considerable length. I do not know of any particular form of findings of fact and conclusions of law or decree or judgment that are required, but you go into it at great length.

The Court: I say at the end that the action must be dismissed.

Mr. Sandvig: Yes. And I say it is dismissed.

The Court: I will overrule the objection. There was no order of dismissal entered, as I construe it." (R. 43)

*Specification of Error No. 5.* The District Court erred in entering the order permitting reopening, filed February 13, 1945 (R. 44).

The question presented by these assignments is the correctness of the Trial Court's order granting the Motion of plaintiff to reopen the case for further testimony after the Trial Court had determined, in a written opinion, that the testimony offered upon the trial was insufficient, and directing dismissal.

## ARGUMENT

In a well-considered opinion, the Trial Court held the plaintiff had not sustained its burden of proof and had not produced the best evidence available to it in permitting Major Ebbs to testify orally to the legal effect and contents of a secret contract, the original of which was in existence, and only a copy of which the witness had seen. He was not a lawyer, although he had in his command a staff of legal experts. The plaintiff made no showing that it could not produce a witness who had seen the original contract and who had sufficient legal training and knowledge to testify as an expert to its contents and legal effect.

The Trial Court took the view that secondary evidence is admissible under proper circumstances in criminal as well as civil cases, relying upon *U. S. v. Gooding*, 25 U. S. 460.

Without conceding the correctness of this view, the plaintiff wholly failed to lay the foundation or fulfill the requirements necessary before such evidence can be received. There was no showing that Lt. Col. Cornell, who was ultimately permitted to testify, was not as available to the plaintiff as a witness at the time of the trial on October 5, 1944, as when he ultimately did testify at the hearing for taking of additional testimony after the case had been reopened on April 11, 1945.

The Motion to reopen the trial, as appellee stated,

"in compliance with the Court's Memorandum Decision," very frankly and apologetically recognizes that plaintiff had been proceeding upon a wholly wrong theory. The Motion states: "Plaintiff further respectfully shows to the Court that the matter of securing a member of the Judge Advocate General Department of the United States Army Engineers who is familiar with the original prime contract referred to herein and in the Court's Memorandum Decision and bringing such officer to Yakima as a witness is a comparatively simple matter; that the ends of justice would best be served as the present lack of 'best evidence' as pointed out in the Court's Memorandum Decision may be supplied in the manner requested herein" (R. 19).

The plaintiff seeks to excuse its failure of proof for the reason that it was treading upon a comparatively strange field of evidence. It then seeks to explain and justify plaintiff's theory with which the Trial Court disagreed in the determination of the cause in the decision of *U. S. v. Haugen*, 58 Fed. Supp. 436.

If this case had been tried to the Court and a jury and the jury had found the defendant not guilty, or at the conclusion of the plaintiff's case as here, the Court had sustained a challenge to the sufficiency of the evidence and dismissed the case, or in the alternative had directed the jury to return a verdict of not guilty, would anyone contend under such state of facts that plaintiff

would be entitled to reopen the case for the submission of further evidence? Or, let us assume that after the submission of all the evidence by the plaintiff and defendant and after hearing argument of counsel, or without argument of counsel, the Court had then and there announced its decision in simple terms merely saying, "Under the evidence, I find the defendant not guilty," would anyone contend that plaintiff could reopen its case for the introduction of additional proof?

In the instant case, the Court did not make such a pronouncement immediately after hearing the evidence, but permitted plaintiff to submit a brief in support of its contention that defendant was guilty. Defendant also was permitted to submit a brief contending that under the evidence he was not guilty. The case was fairly and squarely submitted to the Court for decision as to the guilt or innocence of the defendant. The Court decided and announced his decision in writing to the effect that the objections of defendant to the introduction of testimony should have been sustained, and the Government had failed to prove him guilty.

The Federal Supplement according to the title page contains a report of the cases argued and determined in the District Courts of the United States and Court of Claims. The headnote to *United States vs. Haugen* as reported in 58 Fed. Supp., 436, states:

"Richard Roland Haugen was charged with pos-

> sessing, publishing and uttering counterfeit meal tickets with intent to defraud the United States. Action dismissed."

Defendant earnestly contends this decision meant what it said and actually operated as a dismissal of the case. The Court took the view that because no formal order was entered, no formal dismissal was had (R. 140).

Would the action of the Trial Court have been any more binding upon the parties if the Court upon filing the decision on December 22, 1944, in the office of the Clerk of the Court had directed him to make a minute entry of dismissal upon the Journal, or if the decision had been read in open Court and the Clerk thereupon directed to make such entry? As a matter of practice when a challenge to the sufficiency of the evidence is sustained in open Court, the Judge does not, as a rule, direct the Clerk to make such entry. The Clerk is an officer of the Court and hearing the pronouncement of the Judge or reading the pronouncement of the Judge makes the entry as a matter of course.

If the plaintiff has a right to reopen its case after it has rested every time the Court points out a deficiency in the proof there would be no end to litigation. Carried to its ultimate conclusion there would be no reason why a case could not be reopened after it had been passed upon by the Appellate Court provided a motion

was made before the mandate came down on the expiration of thirty days from the filing of the opinion.

We earnestly contend that the decision of *United States vs. Haugen,* 58 Fed. Supp. 436, was a final determination of the District Court finding the defendant not guilty by reason of insufficiency of proof and dismissing the action. The fact the Court found the defendant not guilty by way of a written memorandum decision instead of an oral pronouncement, immediately after the trial of the case, certainly cannot affect the result.

The defendant, by the Court without findings of fact, has been found not guilty, because of the failure of the Government to introduce competent proof as to his guilt, and we earnestly submit that once a Court has announced such a decision, the defendant has been placed in jeopardy. The decision is final and the plaintiff cannot reopen the case to supply deficiencies of proof, especially where there is no showing of reasonable diligence in securing such proof in the first instance.

The Court in this case was the trier of both the law and facts. The Court, taking the place of the jury, found the defendant not guilty and we submit the case was at an end.

The decision in *United States vs. Haugen, supra,* is obviously correct under the evidence submitted. We

do not believe appellee will contend to the contrary, but has contended and will contend that after appellant had been found not guilty it should be permitted to reopen the case for the purpose of introducing additional evidence which the Court later held was sufficient to prove the defendant's guilt.

There are numerous decisions, the logic of which we recognize, holding that the prosecution may in the sound discretion of the Court reopen its case for the admission of additional evidence before the case has been submitted for final determination, but we find no case in which it has been held that the prosecution can reopen their case after the trial has been concluded, the matter submitted upon briefs and the case decided adversely.

The only question before the Court upon the trial of June 1, 1944, was the guilt or innocence of the defendant of the charges contained in the indictment. The Court by his written memorandum of opinion in effect found the defendant not guilty by reason of the insufficiency of the evidence. If the Court had said the same thing at the conclusion of the evidence, obviously no one would contend that defendant had not been tried.

We recognize the general rule that reopening of a trial for the introduction of further evidence after either or both sides have rested but before decision is within the sound discretion of the Trial Court and will not be disturbed except for a manifest abuse of discretion, as is illustrated in such cases as:

*Lutch v. U. S.*, 73 Fed. (2d) 840;

*Burke v. U. S.*, 58 Fed. (2d) 739;

*Harawitz v. U. S.*, 12 Fed. (2d) 590;

but we earnestly contend such should not be, and is not the rule when the case has been decided adversely, and the plaintiff could by diligence have produced the evidence at the time of trial.

23 C. J. S. Sec. 1055;

*U. S. ex rel. Innes v. Stimson,* 52 Fed. Supp. 425, affirmed *U. S. ex rel. Innes v. Hiatt*, 141 Fed. (2d) 664.

Likewise, it has been held that a trial may be reopened where the testimony was not available until a few minutes before it was offered, such as in *U. S. v. Maggio,* 126 Fed. (2d) 155, where testimony was introduced after the argument had commenced. But in no case or text examined have we found authority to permit the plaintiff to reopen *after both sides have rested, the case has been argued, briefs submitted and an adverse decision rendered by the Court.* Clearly there was a manifest abuse of discretion.

We submit the decision of *U. S. v. Haugen, supra,* governs and this Court should order the case dismissed.

## FORMER JEOPARDY

In this case the defendant was indicted, arraigned and pleaded, the Court heard the evidence and rendered

his decision of dismissal in writing. The question is: Under such circumstances (regardless of the right to reopen) has the defendant been in jeopardy?

The case of *McCarthy v. Zerbst,* 85 Fed. (2d) 640, holds where a case is tried to the Court without a jury, jeopard begins after accused has been indicted and arraigned, has pleaded and the Court has begun to hear evidence, and we submit the instant case fulfills every requirement of this rule.

In 22 C. J. S. Sec. 268, p. 403, under the heading "Acquittal" it is said:

> "The judgment entered by the Court after the rendition of the verdict does not control; and the failure of the Clerk to enter judgment on a verdict of acquittal does not affect its validity as a bar to subsequent prosecutions."

As authority for the above statement, which is a reprint from 16 C. J. Sec. 412, p. 256, there is cited the leading Supreme Court decision of *Ball v. U. S.,* 163 U. S. 662, 16 S. Ct. 1192, 41 L. Ed. 300.

This Court has also held minutes of the Clerk are not part of the bill of exceptions but are merely memoranda which may serve in making up the proposed bill.

*Walker v. U. S.,* 113 Fed. (2d) 314 at 320.

One of the leading cases on the subject of jeopardy is the Ninth Circuit case of

*Cornero v. U. S.*, 48 Fed. (2d) 69, 74 A. L. R. 797,

which states (p. 71):

> "We are here dealing, however, with a fundamental right of a person accused of crime, guaranteed to him by the Constitution, and such right cannot be frittered away or abridged by general rules concerning the advancement of public justice."

and goes on to hold that the *direction* of acquittal by the Court bars a subsequent prosecution for the same offense. If the Trial Court did not *direct* the acquittal of the appellant in the instant case in his decision, we submit there is nothing the Court could have done to make his action more convincing.

*Specification of Error No.* 7. There was a total failure of proof and no substantial evidence to prove the intent of the defendant to defraud the United States of America or any agency thereof (R. 45).

*Specification of Error No.* 8. The verdict of the Court and judgment of conviction is contrary to the law and the evidence. (R. 45).

## ARGUMENT

The effect of the indictment in this case is to charge the appellant with counterfeiting, having in possession, and issuing certain meal tickets upon the Olympic Commissary Company with *intent to defraud the United States of America.*

The uncontradicted evidence of the plaintiff (the defendant offered no evidence) tended to show that defendant caused to be printed certain counterfeit meal tickets and it may be inferred that in so doing he had an intent to defraud *someone,* but he is charged with the offense of intending to defraud the United States of America by making, forging, counterfeiting, uttering, publishing and possessing obligations and other writings of the United States. There was no evidence introduced that defendant forged, counterfeited or uttered anything except some meal tickets upon the Olympic Commissary Company, an Illinois Corporation, what at the time was engaged in purveying and supplying food to the workmen on the Hanford Project. These tickets do not purport upon their face to be writings of the United States. Plaintiff's Exhibit "A" (R. 186). There was not a scintilla of evidence introduced in anywise tending to show the defendant knew they were writings of the United States, if, in fact, they were such.

The statutes in this case are plain and unambiguous (Section 72-73, Title 18, U. S. C. A.), and the burden under the statutes is upon the United States of America to prove that defendant did forge, counterfeit and utter these tickets with the *intent to defraud the United States.*

The Trial Court brushed aside this contention as follows:

"It is equally clear he had the intention of defrauding the Olympic Commissary Company. Now that is the intent which is necessary. It is not necessary for him to know that the Olympic Commissary Company was an agency of the United States. The Olympic Commissary Company just happened to be an agency of the United States, and he intended to defraud this concern, which at that time and under those circumstances was an agency of the United States" (R. 181-182).

It must be conceded, we believe, by the appellee that appellant had no knowledge directly or indirectly that Olympic Commissary Company was an agency of the United States. The contracts were highly secret, so secret, in fact, that even Government Counsel and the Court were unaware that such contracts existed, their contents, who signed them in behalf of the contracting parties, or any other fact in connection therewith.

Counsel for the Government in the opening statement of the trial of June 14, 1944, stated:

> "We will show by pictures the types of signs placed about the commissary, in which the statement is made that all food and equipment used in the building are the property of the Government, and any taking away of property would be prosecuted.
>
> "We will show further that these signs, in conjunction with that, appear at places all the way through the project, at the entrance within the project, and in conjunction with the mess halls, which say 'This is a Federal project, and the prop-

> erty thereon is the property of the Government,' as a matter of notice to the defendant, and we will show at the time he purchased this meal ticket he knew the procedure involved, and knew how the meal tickets were purchased, from the fact of his own experience at the project, and from these signs, and his intention was at the time to defraud the Government by the use of these tickets, and he actually perpetrated the fraud in the sale of these tickets to the individuals named." (R. 53-54)

At the trial of October 5, 1944, certain of these pictures were admitted in evidence as plaintiff's exhibits "N," "O," and "P.". The Government offered a series of pictures of which the Court rejected five and admitted three (R. 100). If the contention is that these pictures constituted notice to defendant that all property was the property of the Federal Government, then we submit where is the proof that these signs were in place at the time of the alleged commission of this offense by defendant on April 19, 1944? There is no evidence except the statement of the witness Piper: "It is a photograph of the sign which appears on the Hanford Reservation, a picture of the sign" (R. 100).

There is no further reference in the testimony of this witness or any other witness as to when the sign was put up, who put it up, and by what authority it was put up, and certainly no evidence that defendant saw or should have seen the sign in the absence of direct proof that it was in place on and prior to April 19, 1944.

If the Government is relying upon Exhibits "N,"

"O" and "P" to prove knowledge on the part of defendant that the Olympic Commissary Company was an agency of the United States, and therefore when he had counterfeit tickets printed and in his possession of the Olympic Commissary Company, he was in effect defrauding the United States, then we submit there was an utter failure of proper proof to justify the admission of these exhibits in evidence against defendant.

The question in this case is whether this Court will extend the rule of *Johnson v. Warden*, 134 Fed. (2) 166. In the *Johnson* case this Court held a forged physician's prescription for narcotics would fall within the meaning of the phrase "other writing," as used in Sec. 72, 73, 18 U. S. C. A. This holding was based upon the proposition that it was not necessary to prove the Government would suffer pecuniary loss. If the alleged unlawful activity be engaged in for the purpose of frustrating the administration of a statute or if it tended to impair a Governmental function it was sufficient. As pointed out in the *Johnson* case it is made unlawful by Federal statute to sell or otherwise dispose of narcotic drugs except under certain conditions, one of which is by prescription of a registered physician, dentist, or veterinarian.

That the traffic in narcotics has long been a subject of Federal legislation is a matter of common knowledge. The average school boy has heard of the Harrison

narcotics act. Clearly this Court was correct in holding the utterance of a forged prescription for narcotics tended directly to frustrate the laws of the United States relating to narcotics.

In *United States v. Mullin* (D. C. Mo.) 51 Fed Supp. 785, the Court held the forging and possessing of gasoline rationing coupons was included in the words, "other writing," within the statute in question. The decision points out the well known fact that the Government, shortly after the outbreak of the war, undertook the regulation of the consumption of gasoline by the civilian population through the medium of the O. P. A. Such fact was known to everyone, whether they owned an automobile or not. The Court properly held that those who forge or have in possession forged gas coupons with the purpose of procuring gasoline were frustrating the administration of a statute and impairing the functions of Government. See also *United States v. Raskin*, 52 Fed. Supp. 343.

In all of the earlier cases such as *United States v. Goldsmith*, 68 Fed. (2) 5 (involving a forged receipt for the payment of taxes by a person impersonating a Federal employee) *Goldsmith v. United States*, 42 Fed. (2) 133 (involving forged letters to an American Consul to induce him to issue a visa), and *United States v. Tynan*, 6 Fed. (2) 668 (involving the possession of a forged prescription for intoxicating liquor contrary

to the National Prohibition Act) a statute or general criminal law of the United States was directly involved, as was the internal revenue act as applied to narcotics in the *Johnson* case, *supra*.

In the instant case there is nothing in the Olympic Commissary Company meal ticket that shows it had any connection with the United States. In none of the cases which have come to appellant's attention is it held that the words "other writing" embrace acts not connected with the violation of some Federal statute. For aught anyone knew (at the date of this indictment) the E. I. du Pont de Nemours Company were engaged in building a plant at Hanford. The matter was handled exclusively and secretly by the War Department. No public statute was involved. The project was not undertaken pursuant to any special or general act of Congress. The Olympic Commissary Company was a large midwestern corporation engaged in food handling for a profit. In what way could it be known the Federal Government was in any way involved? Under such circumstances how could the penal provisions of the statute (18 U. S. C. A. 72, 73) be extended to include a meal ticket in the name of a private corporation where the purpose must be to defraud the United States? After all, in order for defendant to intend to defraud the United States he must know that the administration of a statute or a function of Government is in-

volved. We submit the record in this case discloses a total failure of proof upon that point.

The case of *Head v. Hinton,* 141 Fed. (2) 449, states:

"But the obvious purpose of Section 28 of the Criminal Code (18 U. S. C. A. Sec. 72) is to protect the Government against the forging, altering, or counterfeiting of documents, records, or 'other writing' which have some direct connection with the administration of governmental functions or activities, *Cross v. North Carolina,* 132 U. S. 131, 10 St. Ct. 47, 33 L. Ed. 287, and consistent with that purpose makes use of the words 'other writing' to denote the comprehensive scope of the legislation.'

Again we submit, is there any proof that the alleged counterfeit meal tickets had any *direct connection* with the administration of Governmental functions and activities? No known officer or agent of the United States was involved. Clearly sections 28 and 29 of the Criminal Code (Secs. 72, 73, Title 18, U. S. C. A.) should not be extended to cover the possession and counterfeiting of meal tickets of a private corporation which, if an agent of the United States at all, is such agent in a very indirect and limited degree, and that only by virtue of a secret contract not introduced in evidence.

*Specification of Error No.* 2. The District Court erred in admitting over the objection of defendant

hearsay evidence as to the contents of the contract between the United States of America and E. I. duPont deNemours & Company and the sub-contract between the duPont Company and Olympic Commissary Company, the contract being the best evidence, as follows:

"Q. First I wish to ask you some general questions. Who is the company that is doing the construction work at Hanford?

Mr. Sandvig: If he knows of his own personal knowledge.

Mr. Erickson: He is in charge of the construction.

A. Am I to answer if I know it of my own personal knowledge or officiall?

Mr. Sandvig: Of your own personal knowledge.

Q. If you know it officially.

Mr. Sandvig: No; of his own personal knowledge.

A. The E. I. duPont deNemours Company.

Q. The E. I. duPont deNemours Company is building the project at Hanford?

A. They are the prime contractor.

Q. By prime contractor you mean they have the contract with the United States government?

Mr. Sandvig: I object as not the best evidence. If there is a contract between the duPont Company and the United States, the contract itself is the best evidence.

The Court: I am inclined to agree with you, but I will let him answer and allow an exception, and I may later strike out the answer. I don't know yet.

(Question read by reporter.) )

A. Yes.

Q. Now the contract with the E. I. duPont de-Nemours Company has with the United States, is that a public contract, or otherwise?

Mr. Sandvig: May it be understood, Your Honor, without bothering the Court all the time, that I am objecting to all of this?

The Court: It is all subject to your objection, and an exception is allowed.

A. The contract is a secret contract.

Q. By whose orders is it a secret contract?

A. By the War Department.

Q. And you have——

The Court: Wouldn't that be a thing which——

Mr. Sandvig: I am taking it for granted my objection goes to all of this.

The Court: The Secretary of War would issue some sort of an order, would he not?

Mr. Sandvig: Yes, sure.

The Court: That it would be secret?

Mr. Erickson: I will establish that, I think.

The Court: All right.

Mr. Sandvig: The order itself would be the best evidence. That is like me saying what the statute is.

The Court: Go ahead, Mr. Erickson.

Q. Did the War Department, or who in the War Department issued that order?

Mr. Sandvig: If you know of your own personal knowledge.

A. The order came to my commanding officer from the office of the Chief of Engineers.

Mr. Sandvig: I make the same objection.

The Court: It is all being admitted subject to your objection.

Mr. Sandvig: I am afraid I will slip up on something.

The Court: You are not going to slip up on anything. You have your objection. It does seem to me, Mr. Erickson, that the order making it secret is something that could be produced.

Q. (Mr. Erickson): Is that something that can be produced?

A. I am not sure it was not a verbal order.

Q. Whom did you receive instructions from that the contract was secret?

A. I received verbal instructions from the office of the Chief of Engineers.

Q. And who in that office?

Mr. Sandvig: Subject to my objection.

Q. From whom in that office did you receive the instructions?

Q. I received instructions that individual's name was not to be brought into a public hearing.

The Court: What justification could there be for concealing from the public an order which says that the contract is to be secret? He says he has orders to keep secret who gave the order." (R. 102-5)

*Specification of Error No.* 3. The District Court erred in permitting the plaintiff to introduce over objection oral secondary evidence as to the legal effect and contents of said contract, particularly between the duPont Company and Olympic Commissary Company, said subcontract being the best evidence, as follows:

"A. The E. I. duPont deNemours Company have a cost-plus fixed-fee contract with the government.

Q. Explain so we can understand——

Mr. Sandvig: The contract itself is the best evidence.

The Court: Yes; this all goes in over your objection." (R. 108)

*Specification of Error No.* 6. The District Court erred in admitting in evidence additional hearsay testimony relating to the contract between the United States of America and the duPont Company after such reopening, as follows:

"Q. Now directing your attention to the original contract between the United States Government and the E. I. duPont deNemours Company, what provision is made in that contract about property used in the prosecution of the work on the Hanford Engineer Works?

Mr. Sandvig: I object to that as not being the best evidence. The witness has the contract before him. They have opened the doors now, and the contract is no doubt admissible. He has been using it for evidence, and certainly the contract is the best evidence. No matter how good a lawyer he may be, we might disagree on its interpretation. The contract itself is the best evidence.

The Court: The objection is overruled." (R. 148-9)

## ARGUMENT

The above three specifications are assigned as error and directed against the reception in evidence of oral testimony of witnesses as to the contents and legal effect of contracts which were not introduced in evidence for the reason the contracts had been directed by the War Department to be kept secret, it being the contention of the appellant the contracts themselves were the best evidence. The Trial Court has fully discussed this phase of the case in the written decision (R. 9-18).

In this opinion the Trial Court held the best evidence in the power of the party to furnish must be produced and the plaintiff had failed to do so by the testimony of Major Ebbs. Although not cited in the opinion,

this ruling is sound and is in line with the Ninth Circuit case of *Schreve v. U. S.*, 103 Fed. (2d) 796. After the order permitting the reopening, this deficiency was supplied, *to the satisfaction of the Trial Court,* by the testimony of Lt. Col. Cornell as indicated in the Trial Court's oral decision (R. 176-184).

Without in any manner waiving our argument under specifications of Error 4, 5 and 7, the appellant challenges the sufficiency of Lt. Col. Cornell's testimony, taken as a whole, to justify the conclusion of the Trial Court or to in any manner change the conclusion reached in the decision of *U. S. v. Haugen*, 58 Fed. Supp. 436.

It appears from the testimony of this witness the Olympic Commissary Company is a corporation organized under the laws of the State of Illinois, although no proof of such was offered other than the oral statement of Lt. Col. Cornell (R. 166).

The contract between E. I. duPont deNemours Company was not offered in evidence although frequently requested by defendant, nor was the prime contract between the duPont Company and the Government.

Lt. Col. Cornell testified that as Chief of the Legal Staff of the Manhattan District he had charge of the supervision and drafting of the contract for the construction of the Hanford Engineer Works (R. 141); that such contract was secret (R. 143), as was the con-

tract between the duPont Company and Olympic Commissary Company (R. 144). The witness had the contract before him while testifying, and although he had himself drawn and prepared the contract on behalf of one of the contracting parties he was permitted to testify as to his interpretation of its provisions (R. 149).

After some discussion as to whether or not the defendant was to be convicted upon the conclusions of this witness, the Court was permitted to examine the contract between the duPont Company and Olympic Commissary Company in chambers. The contract was not marked as an exhibit nor offered in evidence for the inspection of the defendant or his counsel.

We submit that plaintiff having thus opened the door should have been compelled by the Court to offer the contract in evidence, in order that the Appellate Court in event of the conviction of defendant would have the opportunity to read said contract. This is only simple justice to the end that a proper ascertainment could be made by the Appellate Court as to the correctness of the interpretation of the provisions and the conclusions reached by the witness and the Court.

It developed in Lt. Col. Cornell's testimony that while the original contract between the United States and duPont Company was secret, the sub-contract between duPont Company and Olympic Commissary Company were merely restricted.

"Q. (Mr. Sandvig): The other one is merely a restricted contract, available to any employee of the United States?

A. That is right.

Q. There would be an objection to me seeing that?

A. In its entirety. I would be very glad to show you any of the administrative portions, relating to this particular thing.

Q. It would be hard for me to get at it, but you will let the Court take it to his chambers?

A. Yes, sir." (R. 160)

If, as stated by the witness, this contract is available to any employee of the United States, why was it not offered in evidence so the Appellate Court could read it and place the Court's own interpretation upon it?

The grounds for the admission of secondary evidence are that the primary evidence has been lost or destroyed or is otherwise inaccessible (22 C. J. S. Sec. 706, p. 1196). However, before secondary evidence is admissible, the competency and genuineness of the primary evidence must be established and a proper foundation must be laid by establishing by satisfactory and sufficient proof that the primary evidence cannot be produced.

*Schreve v. U. S.*, 103 Fed. (2d) 796;

*Hass v. U. S.*, 93 Fed. (2d) 427;

*Hartzell v. U. S.*, 72 Fed. (2d) 559.

We submit a reading of the record demonstrates there was no good and sufficient reason why the contract between duPont Company and Olympic Commissary Company was not offered in evidence and that defendant's objections on account of such failure are well taken.

## CONCLUSION

Although eschewing any doubt plainly the Trial Judge was anything but confident after hearing the additional testimony following the reopening of the case that he had reached the right conclusion.

In the Court's oral decision, he declared:

> "The Court: I am in full accord with Mr. Sandvig's statement that this case is unique. It is unique in practically all of its phases, and because it is unique, and several questions have arisen which are practically questions of first impression, so far as any court is concerned, without in any way indicating any doubt in my own mind as to the correctness of the conclusions I have reached, I will say that I hope the defendant is able and willing to prosecute an appeal in this case, and if he does I will fix the bond in an amount which will enable him to appeal and remain at liberty."

We agree with the Trial Court's conclusion that this is a unique case and many of the questions presented are of first impression, but summarizing and briefly restating appellant's position, we find:

1. The appellant was tried on October 5, 1944, upon a valid indictment by a Court of competent jurisdiction, without a jury, the evidence was closed, the Court determined the plaintiff had failed in its proof, the case must be dismissed, and such determination ended the case, and to put the defendant again upon trial placed him in jeopardy and was prejudicial to his constitutional rights.

2. There was a total failure of evidence to prove the intent of the defendant to defraud the United States, the burden of proving which rested at all times upon the plaintiff.

3. The appellant was convicted upon secondary evidence, conclusions and hearsay when the primary evidence was readily available.

4. In this case the verdict of the Court and Judgment of Conviction is contrary to the law and evidence and should be reversed.

Respectfully submitted,

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*Attorneys for Appellant.*